

SERVED: June 25, 1992

NTSB Order No. EA-3595

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10429

v.

URIAH WORTH,

Respondent:.

OPINION AND ORDER

The Administrator has appealed from an initial decision of Administrative Law Judge William R. Mullins, issued orally at the conclusion of an evidentiary hearing held on February 8, 1990.¹ By that decision, the law judge reversed in part an order of the Administrator suspending respondent's private pilot certificate for 60 days for alleged violations of sections 91.88(c), 91.105(c) and 91.9 of the Federal Aviation Regulations ("FAR,"

¹An excerpt from the transcript containing the initial decision is attached.

14 C.F.R.)² stemming from a flight conducted on December 8, 1988, finding respondent in violation of only section 91.9 and reducing the sanction imposed against him to a 20-day suspension.

In the order of suspension (which served as the complaint), the Administrator alleged the following:

- "1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 526660373.
2. On or about December 8, 1988, you, as pilot-in-command, operated civil aircraft N410B, a Beech Model A35, on a VFR flight with an intended destination of Deer Park, Washington.
3. on the occasion of the foregoing flight, you operated N410B into the Spokane Airport Radar Service Area (ARSA) without establishing two-way radio communication with ATC prior to entering that area.

²FAR § 91.88(c) as was then in effect (and which has since been amended and remodified (as § 91.130(c)) provided as follows:

"§ 91.88 Airport radar service areas.

* * * * *

(c) Arrivals and Overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC [air traffic control] prior to entering that area and is thereafter maintained with ATC while within that area."

FAR §§ 91.105(c) and 91.9 (which have since been remodified as §§ 91.155(c) and 91.13(a), respectively) read as follows:

"§ 91.105 Basic VFR weather minimums.

* * * * *

(c) Except as provided in § 91.107 [which sets forth special visual flight rules (VFR) weather minimums applicable when an airman has received appropriate clearance from ATC (§ 91.107 has since been remodified as § 91.157)], no person may operate an aircraft under VFR, within a control zone beneath the ceiling when the ceiling is less than 1,000 feet.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

4. On the occasion of the foregoing flight, you operated N410B into the Spokane International Airport control zone beneath the ceiling when the ceiling was less than 1000'.
5. By operating N410B in the manner and under the circumstances set forth above you operated an aircraft in a careless manner so as to endanger the life or property of another."

The law judge, in arriving at his decision, determined that respondent had failed to comply with FAR sections 91.88(c) and 91.105(C), but that such noncompliance should be excused because it resulted from an emergency not of respondent's making.³ His ruling that respondent violated section 91.9 was based on a determination that respondent had been careless in failing to squawk the appropriate codes over his transponder, indicating that he had a radio-related emergency, once he recognized that he was unable to establish two-way radio communication with ATC before entering the Spokane ARSA.⁴

³In so holding, the law judge applied FAR § 91.3(b), which provides:

"§ 91.3 Responsibility and authority of pilot in command.

(b) In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart . . . to the extent required to meet that emergency."

The Board has long held that, for an affirmative defense founded upon § 91.3(b) to be valid, the emergency situation faced by the airman asserting that defense must be one which was not of his own making and which could not have been avoided by the exercise of sound judgment before and during the flight. See, e.g., Administrator v. Wilson, 1 NTSB 1367, 1369 (1971).

⁴Respondent, who is acting pro se, did not appeal either the finding of a § 91.9 violation or the 20-day suspension imposed therefor.

In his appeal brief, the Administrator contends that respondent could have anticipated that he would have encountered below-VFR weather conditions during the flight in question. Consequently, he argues that the weather-related difficulties experienced by respondent on that flight were avoidable, that the law judge thus erred in finding that respondent was faced with an emergency not of his own making, and that respondent should, therefore, be held in violation of FAR section 91.105(c). While he also asserts that an affirmative defense founded upon section 91.3(b) should not be available to respondent with respect to the section 91.88(c) charge, the Administrator has advanced no specific contentions in support of that position in his brief.⁵

A review of the evidence in this case discloses that the flight in question originated at Anderson Airport, near Brewster, Washington, which lies approximately 95 nautical miles (NM) due west of Deer Park.⁶ Deer' Park is located in the Spokane region, and its airport is situated about 20 NM to the north of Spokane International.⁷ According to respondent's testimony, he made three calls to the regional flight service station to check on the weather for the Spokane area before taking off. On the night before the flight, he was told that the conditions there were

⁵No reply brief was submitted by respondent.

⁶See Ex. A-1.

⁷Id. Spokane International is the closest major airport to Deer Park Airport. Id.

less than VFR, but were expected to improve by the following morning. Early the next morning, respondent was informed that, while the conditions were still not VFR, it was anticipated that they would ameliorate by 10:00 a.m. On his third call to the flight service station, which occurred shortly before takeoff, between 10:00 and 11:00 a.m., respondent was informed that the conditions had become minimal VFR, and were expected to continue to improve. Respondent also testified that he was told "that the front was moving toward the north."⁸ On the basis of that forecast, he proceeded with the flight.⁹

Respondent has further related that, after taking off, he flew along the Columbia River, where the conditions were VFR all the way (with a ceiling of approximately 1,500 to 2,000 feet above ground level) until he reached a point about 20 NM from Deer Park Airport where he began to encounter lowering clouds and snow.¹⁰ He then turned around to go back, but saw that the weather behind him had deteriorated as well. Consequently, respondent began to circle and unsuccessfully attempted to contact ATC at Spokane International." After seeing ice begin to build up on his wings, respondent flew along a road leading to Spokane International at an altitude of approximately 200 to 300 feet above ground level, and continued to attempt to establish

⁸Tr. 16.

⁹Id.

¹⁰Id. 16, 23; Ex. A-1.

¹¹Tr. 16-17.

radio contact with ATC. Respondent testified that he also squawked the VFR code of 1200 on his transponder in an attempt to get ATC's attention,¹² and that he eventually received a faint broadcast from ATC clearing him to land as he neared the airport. Shortly thereafter, he landed at Spokane International.¹³

With respect to the section 91.105(c) charge, the Board does not believe that the weather-related emergency faced by respondent was unforeseeable. In this regard, we note that the forecast he received from the regional flight service station shortly before takeoff indicated that the conditions at Spokane were only marginally VFR. Moreover, that forecast suggested that a front might be moving north from Spokane toward Deer Park. We also note that respondent's route took him over a mountainous area, where the distance from the surface to the clouds could be expected to decrease. Indeed, it was in this area where respondent began to encounter deteriorating meteorological conditions.¹⁴ Under similar circumstances, the Board has held that, by commencing a flight in marginal VFR conditions, an airman takes a calculated risk that the conditions will remain VFR during the entire flight, and that, when this turns out not to be the case, "the predicament in which he suddenly [finds]

¹²This was accomplished when respondent was at a point approximately six miles from Spokane International. Tr. 59.

¹³Upon landing, respondent had his radio checked out. A crack was found in the antenna and it was suggested that moisture had collected in that crack, causing respondent's radio to short out. Tr. 19-20. The antenna was replaced immediately. Id. 20.

¹⁴See Tr. 23-24, Ex. A-1.

himself [is] one of his own making, rather than the result of conditions which could not have been reasonably anticipated" by him.¹⁵ Consequently, we cannot find that respondent's failure to comply with FAR section 91.105(c) in this case is excusable due to the existence of a weather-related emergency.

Insofar as the allegation of a section 91.88(c) violation is concerned, respondent has indicated that he experienced unexpected radio difficulties due to a crack in his antenna, which made it impossible for him to establish two-way radio communication with ATC prior to entering the Spokane ARSA. As no evidence tending to demonstrate that the radio-related emergency which arose as a result was either of respondent's making or avoidable through the exercise of due care on his part, we must concur with the law judge's determination that respondent's failure to comply with section 91.88(c) should be excused pursuant to the provisions of section 91.3(b).

Turning to the matter of sanction, we believe that the law judge's determination that respondent violated FAR section 91.9 together with our finding that he was in violation of section 91.105(c) requires the imposition of a greater penalty than the 20-day suspension mandated in the initial decision. In our

¹⁵Administrator v. Sidicane, 3 NTSB 2447, 2450 (1980), citing Administrator v. Javoian, 1 NTSB 2032, 2034-35 (1972) and Administrator v. Pandey, 3 NTSB 2165 (1979); affirmed 698 F.2d 1723 (6th Cir. 1982). In this regard, we also note that the official surface weather observation report for Spokane International (Ex. A-3) indicates that the conditions observed there were below the minima required for VFR operations under FAR § 91.105(c) during respondent's flight. See Tr. 61-64.

judgment, a suspension of 45 days would be appropriate for the FAR violations which have been established and we will, therefore, impose such a sanction upon respondent.

ACCORDINGLY , IT IS ORDERED THAT:

1. The Administrator's appeal is granted insofar as the initial decision reversed his order finding that respondent had violated FAR section 91.105(c);
2. The Administrator's appeal is denied insofar as the initial decision reversed his order finding that respondent violated FAR section 91.88(c);
3. The initial decision is reversed to the extent that the law judge found that respondent had not violated FAR section 91.105(c); and
3. A 45-day suspension of respondent's private pilot certificate is hereby imposed for violations of FAR sections 91.105(c) and 91.9. That suspension shall begin 30 days from the date of service of this order.¹⁶

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

¹⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).